Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
MEMORANDUM
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO:	Nyasha Smith, Secretary of the Council
FROM:	Charles Allen, Chairperson, Committee on the Judiciary and Public Safety CA
RE:	Closing Hearing Record
DATE:	November 25, 2019

Dear Ms. Smith,

Please find attached copies of the Hearing Notice, Agenda and Witness List, and testimony for the Committee on the Judiciary and Public Safety's June 24, 2019, public hearing on B23-0083, the "Vulnerable User Collision Recovery Amendment Act of 2019"; B23-0134, the "Community Harassment Prevention Amendment Act of 2019"; B23-0253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019"; and B23-0300, the "Antitrust Remedies Amendment Act of 2019".

The following witnesses testified at the hearing or submitted written testimony to the Committee:

B23-0083, the "Vulnerable User Collision Recovery Amendment Act of 2019"

i. Public Witnesses

1. David Cranor, Representative, Bicycle Advisory Council
2. Wayne McOwen, Executive Director, District of Columbia Insurance Federation
3. Laura Miller Brooks, Public Affairs Manager, Mid-Atlantic, Lime
4. Navya Crick, Public Witness
5. Ryan Evans, Public Witness
6. Xander Saide, Public Witness
7. Federico Brusa, Public Witness
8. Christopher Semenas, Public Witness
9. Julie Mitchell Newlands, President, Trial Lawyers Association of Metropolitan Washington, D.C.

ii. Government Witness

1. Dena Iverson, Chief of External Affairs, District Department of Transportation

B23-0134, the "Community Harassment Prevention Amendment Act of 2019"

i. Public Witness

1. Nassim Moshiree, Policy Director, ACLU of the District of Columbia

ii. Government Witnesses

1. Karl Racine, Attorney General for the District of Columbia
2. Kelly O'Meara, Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department
3. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
4. Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission

B23-0253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019"

i. Public Witnesses

1. Daniel Singer, Executive Board Member, Trial Lawyers Association of Metropolitan D.C.
2. Wayne McOwen, Executive Director, D.C. Insurance Federation

ii. Government Witnesses

B23-0300, the "Antitrust Remedies Amendment Act of 2019"

i. Public Witnesses

ii. Government Witness

1. Catherine A. Jackson, Chief, Public Integrity Section, Office of the Attorney General

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B23-0083, THE "VULNERABLE USER COLLISION RECOVERY AMENDMENT ACT OF 2019"

B23-0134, THE "COMMUNITY HARASSMENT PREVENTION AMENDMENT ACT OF 2019"

B23-0253, THE "ALTERNATIVE SERVICE OF PROCESS ON DISTRICT OF COLUMBIA RESIDENTS AMENDMENT ACT OF 2019"

AND

B23-0300, THE "ANTITRUST REMEDIES AMENDMENT ACT OF 2019"

Monday, June 24, 2019, 10:30 a.m.
Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

On Monday, June 24, 2019, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing on Bill 23-0083, the "Vulnerable User Collision Recovery Amendment Act of 2019"; Bill 23-0134, the "Community Harassment Prevention Amendment Act of 2019"; Bill 23-0253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019"; and Bill 23-0300, the "Antitrust Remedies Amendment Act of 2019". The hearing will take place in Room 120 of the John A. Wilson Building, 1350 Pennsylvania Avenue, N.W., at 10:30 a.m.

The stated purpose of B23-0083, the "Vulnerable User Collision Recovery Amendment Act of 2019", is to amend the Motor Vehicle Collision Recovery Amendment Act of 2016 to limit the application of the doctrine of contributory negligence in cases of a collision between an electronic mobility device user of a public highway and a motor vehicle.

The stated purpose of B23-0134, the "Community Harassment Prevention Amendment Act of 2019", is to amend the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982 to make it unlawful to deface or burn a religious or secular symbol on any property of another without permission or to place or display on such property a physical impression that a reasonable person would perceive as a threat to physically damage the property of another; and to amend the Omnibus Public Safety and Justice Amendment Act of 2009 to make it unlawful to harass an entity.

The stated purpose of B23-0253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019", is to amend the Motor Vehicle Safety Responsibility Amendment Act of the District of Columbia to allow a plaintiff to use an alternative method of service of process when serving defendants in motor vehicle cases who reside in the District of Columbia.

The stated purpose of B23-0300, the "Antitrust Remedies Amendment Act of 2019", is to identify remedies the Attorney General may seek in an antitrust action, to specify how monetary relief recovered on behalf of individuals in an action under D.C. Official Code § 28-4507(b) shall be distributed, and to apply the notice and exclusion provisions of that section specifically to individuals.

The Committee invites the public to testify or to submit written testimony. Anyone wishing to testify at the hearing should contact the Committee via email at judiciary@dccouncil.us and provide their name, telephone number, organizational affiliation, and title (if any), by **close of business Thursday, June 20**. Representatives of organizations will be allowed a maximum of five minutes for oral testimony, and individuals will be allowed a maximum of three minutes. Witnesses should bring **twenty copies** of their written testimony and, if possible, also submit a copy of their testimony electronically in advance to judiciary@dccouncil.us.

For witnesses who are unable to testify at the hearing, written statements will be made part of the official record. Copies of written statements should be submitted to the Committee at judiciary@dccouncil.us. **The record will close at the end of the business day on Monday, July 8.**

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B23-0083, THE "VULNERABLE USER COLLISION RECOVERY AMENDMENT ACT OF 2019"

B23-0134, THE "COMMUNITY HARASSMENT PREVENTION AMENDMENT ACT OF 2019"

B23-0253, THE "ALTERNATIVE SERVICE OF PROCESS ON DISTRICT OF COLUMBIA RESIDENTS AMENDMENT ACT OF 2019"

AND

B23-0300, THE "ANTITRUST REMEDIES AMENDMENT ACT OF 2019"

Monday, June 24, 2019, 10:30 a.m.
Room 120, John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

B23-0083, the "Vulnerable User Collision Recovery Amendment Act of 2019"

i. Public Witnesses

1. David Cranor, Representative, Bicycle Advisory Council
2. Wayne McOwen, Executive Director, District of Columbia Insurance Federation
3. Laura Miller Brooks, Public Affairs Manager, Mid-Atlantic, Lime

ii. Government Witness

1. Dena Iverson, Chief of External Affairs, District Department of Transportation

B23-0134, the "Community Harassment Prevention Amendment Act of 2019"

ii. Public Witnesses

iii. Government Witnesses

1. Kelly O'Meara, Executive Director, Strategic Change Division, Executive Office of the Chief of Police, Metropolitan Police Department
2. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

B23-0253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019"

i. Public Witness

1. Daniel Singer, Executive Board Member, Trial Lawyers Association of Metropolitan D.C.

ii. Government Witnesses

B23-0300, the "Antitrust Remedies Amendment Act of 2019"

i. Public Witnesses

ii. Government Witness

1. Catherine A. Jackson, Chief, Public Integrity Section, Office of the Attorney General

IV. ADJOURNMENT

Testimony of David Cranor of the Bicycle Advisory Council

The **Bicycle Advisory Council supports the Vulnerable User Collision Recovery Amendment Act of 2019**, expanding the current contributory negligence carve-out for pedestrians and cyclists to those on e-bikes and scooters. Under the current law, if one of those users is found to be even 1% at fault in a collision, it can be impossible for them to recover any damages from the other party in a lawsuit; even if the other party was primarily at fault. This is harmful to people in an unfair way.

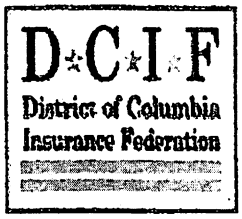
By instead assigning damages based on the percentage the guilty party is at fault, the carve-out protects vulnerable users from carrying the full burden when a driver is primarily at fault. The current doctrine of contributory negligence is particularly burdensome for vulnerable users for several reasons:

1. Vulnerable users are more likely to sustain injuries in a collision with a motor vehicle, while the driver will usually walk away unharmed. It is a simple matter of speed and mass. Because they are disproportionately injured and more likely to sustain damage in a collision, contributory negligence transfers the burden of traffic injuries and damage from drivers to vulnerable users almost without regard to who is primarily at fault.
2. There remains confusion and misunderstanding among MPD officers and the general public regarding laws for vulnerable users. Cyclists have been improperly ticketed at a collisions and thus improperly assigned fault, and its possible such mistakes could be made for others as well. The current doctrine of contributory negligence compounds such errors, to the disadvantage of vulnerable users.

Comparative negligence does not solve misunderstanding of rules of the road, or prevent crashes, but it would substantially improve the lives of users of slow-speed mobility devices by preventing the improper application of laws from leading to significant financial loss and the inability to pay for needed medical care resulting from such crashes.

It's the opinion of the BAC however, that **this bill doesn't go far enough.** The heart of this issue is that many vulnerable road users are not required to carry insurance, and rightfully so, and that the doctrine of contributory negligence works against those who don't. The Council has expanded the carve-out to some vulnerable users, specifically a new category of "electric mobility device users," but not others. Those riding e-bikes and electric scooters will benefit from this, but not other users of "motorized bicycles" or "personal mobility device". This leaves out many small transportation devices including motorized, seated scooters - like "rascal" brand scooters, segways and smaller mopeds. None of these users are required to carry insurance. The BAC sees no good reason to leave these vulnerable users in the situation that this law is meant to prevent. A person on a segway has the same safety and recovery issues as a person on a bicycle. A person on a gasoline-powered bicycle has the same issues as one on a battery powered one. Therefore, we would suggest that this carve-out be widened even more. Instead of limiting it to just these two types of vulnerable users, we believe the law should be expanded to anyone on a vehicle that does not require insurance under DC law. That would mean all users

of "personal mobility devices" and "motorized bicycles." Widening the carve-out to apply to any user who isn't required to have insurance addresses the actual issue - that the doctrine of contributory negligence doesn't work for people without insurance - and it prevents us from being back here in 4 years to address new personal mobility devices that at this moment none of us foresee.



DISTRICT OF COLUMBIA INSURANCE FEDERATION

1455 Pennsylvania Ave, NW Suite 400 Washington DC 20014

wmcowen@dcif.org * 202.797.0757

Testimony of

District of Columbia Insurance Federation

Submitted to the

DC Council Committee on the Judiciary and Public Safety

Public Hearing Held

24 June 2019

23-83, the "Vulnerable User Collision Recovery Amendment Act of 2019"

Good morning, Chairman Allen and members of the Committee on the Judiciary and Public Safety. My name is Wayne E. McOwen, and I represent the District of Columbia Insurance Federation (DCIF), a state insurance trade association whose members provide property, casualty, life and health insurance products and services in the District of Columbia. On behalf of the DCIF, I offer the following remarks for consideration:

The insurance industry applauds a number of legislative initiatives which, over the past several years, have encouraged cyclists, pedestrians and motorists to safely share the historic pathways that weave around and through the nation's capital – an environment that swells daily with a workforce of resident and non-resident employees, and swells seasonally with tourists from around the world. But, enabling and maintaining a safe environment is not solely the responsibility of the law makers and the law enforcers. Walking, steering a bicycle, driving a motorized conveyance -- all require attentiveness, courteous behavior, a respect for rules of the road and respect for the others that one encounters on those roads. These are goals achieved less by legislation, more by education. I appreciate the opportunity to say publicly, and for the record, that the DCIF is willing and eager to help to support initiatives to educate and encourage continued progress toward the safest coexistence among pedestrians, cyclists, motorists and users of other-than-four-wheeled motorized conveyances.

The initiative that is the subject of this Hearing is one which intends to amend an initiative which became law in October, 2016. That initiative, now Act A21-490, deferred the issue of safety in favor of carving out one group for unique treatment. Choosing a mode of transportation that won't pollute the environment is admirable. But even the strongest sense of environmental responsibility does nothing to increase safety and prevent injuries!

How many motorists run red lights? How many cyclists run red lights and take shortcuts? How many pedestrians jaywalk? How many e-scooter operators terrorize pedestrians on our city sidewalks? Contributory negligence holds that if one contributes to an accident, there is a barrier to recovery. And, there should be.

Still, the Motor Vehicle Collision Recovery Act of 2016 is now law. And the initiative that is the subject of today's Hearing intends to further amend it to embrace an additional

class of "vulnerable users." But, should efforts intended to protect vulnerable users of any class excuse those users from their responsibility to protect themselves and others?

For the balance of my testimony I will focus on motorized scooters and suggest that if Act A21-490 is to be amended, let's use this opportunity to infuse that amendment with a requirement for reasonable and safe behaviors.

They've got clever names—Bird, Lime, Skip, Scoot, Spin—and in many cities they appeared seemingly overnight. E-scooter sharing is a new phenomenon in the burgeoning landscape of alternative transportation we've come to know as ridesharing. In some US cities there are hundreds of scooters, and they've caused headaches for consumers and for the cities in which they are operated. Some scooters, capable of reaching speeds of 15-20mph, may or may not require proof of a valid driver's license. Proof of insurance is not a requirement for renting an e-scooter, although some cities, such as San Francisco, require scooter rental companies to obtain a permit from the city and provide proof of insurance before they can operate legally. But, what about the operators of scooters?

Unless an insurance policy indicates otherwise, there may not be coverage in case of an e-scooter accident. A health or accident insurance policy may provide coverage for the medical injury sustained by the operator. However, there may not be any coverage if the operator is found liable for an accident or damage. Automobile insurance often omits liability coverage for motor vehicles with fewer than four wheels, and it's unlikely to apply to scooter rentals. Although most homeowner policies provide some liability coverage even away from the residence, it may be limited or excluded because the scooter is a rental. Numerous e-scooter accidents have been reported since 2018. In September, 2018, the first reported death from an e-scooter accident occurred in Dallas.

Proponents argue that scooters are inexpensive, easy to use, convenient for short trips and they help reduce traffic and air pollution. A recent survey of 7,000 people in ten US markets revealed that, in less than twelve months during 2018, nearly 4% said they'd used an e-scooter.

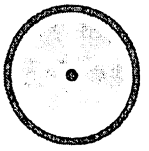
Others view scooters more as a nuisance than a convenience, with residents and pedestrians complaining of cluttered sidewalks and reckless driving.

Several states have initiated actions. Delaware has banned the use of motorized scooters on public streets, and New Jersey limits their use to people with mobility-related disabilities. Massachusetts' definition effectively prohibits their use due to requirements that "motorized scooters" have brake lights and turn signals, neither of which is common on rentable e-scooters.

Many states are still working to define scooters in statute. As of December last year, ten states, California, Delaware, Massachusetts, Minnesota, New Jersey, Oregon, Texas, Utah, Virginia and Washington, had statutorily defined an electric or motorized scooter. Eight of those states offer guidance on legal operation of the vehicles.

Given the lack of clarity in state law and the growing popularity of e-scooters, the District of Columbia might consider legislation focusing on defining e-scooters, determining whether they can be operated on streets or sidewalks and setting speed limits and other safety considerations. Infusing such provisions in B23-83 is an ideal opportunity to address the responsibility, not just the vulnerability, of e-scooter users.

Thank you for the opportunity to provide testimony on this issue. I welcome your comments, questions regarding the above.



TESTIMONY OF LAURA MILLER BROOKS, PUBLIC AFFAIRS MANAGER
LIME

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY

Public Hearing on Bill 23-83, the "Vulnerable User Collision Recovery Amendment Act"

John A. Wilson Building Room 120
June 24, 2019

Good morning Chair Allen, members of the Committee on the Judiciary and Public Safety, and staff. Thank you for convening this hearing on Bill 23-83, the Vulnerable User Collision Recovery Amendment Act (the "Act"). My name is Laura Miller Brooks, and I am the Mid-Atlantic Public Affairs Manager for Lime. Lime is a dockless mobility company that aims to reduce dependence on personal automobiles for short-distance transportation through the equitable distribution of shared scooters, bikes, and transit vehicles. Lime is about safe, convenient, environmentally friendly, and affordable movement for all residents. I appreciate the opportunity to testify. Now more than ever, the District needs to support first- and last-mile transportation options while at the same time working toward Vision Zero goals. The Act is an important step toward both objectives.

Lime is proud to have been operating in the District since DDOT launched its dockless mobility demonstration program in September 2017. In this time, D.C. residents and visitors have taken more than 850,000 rides.

While shared micromobility is relatively new to the District, we commend members of this Committee for leading a robust conversation on the issue through Act and other efforts. Lime strongly supports the Act in particular as an important safety measure for D.C. residents who use electric scooters and electric bicycles for transportation. Extending the modified comparative fault doctrine to these users makes sense given the Council's intent with establishing the doctrine for bicyclists and pedestrians through the Motor Vehicle Collision Recovery Amendment Act of 2016. At that time, this Committee noted the District's interest in promoting bicycling and walking as alternatives to motorized transportation, given their transportation, environmental, economic, and health benefits. It also noted the rapid increase in the use of bicycles for transportation within the District.

These same reasons support making clear that the modified comparative fault doctrine extends to users of electric scooters. Lime first deployed scooters in the District in March 2018, and in just 15 months, scooter usage has proliferated among D.C. residents. According to a recent *Washington Post* poll, 16% of D.C. residents reported using an electric scooter for transportation. So, like bicycles, scooters are quickly growing in use in the District, and the laws should reflect the reality that D.C. residents want scooters as a transportation option.

Further, like bicycling and walking, ensuring that using a scooter is a viable option for transportation helps advance the District's policy goals. Scooters complement the District's array of active transportation options in a way that increases transportation equity, reduces

carbon emissions, and improves traffic safety. Our transportation data shows that D.C. customers are using Lime scooters to commute, with 29 percent starting or ending their ride at transit stops, including bus and Metro. Importantly, 30 percent of Lime riders replaced a trip by automobile (personal car, carshare, or ride-hailing) during their most recent trip. We can quickly help the District, at no cost to the city, expand transportation options to residents who currently do not have an option that works for them, and to neighborhoods where these options are inadequate. Lime's ability to bring our fleet to District neighborhoods is one of our major focuses and desires. By ensuring that scooter users have fair legal protections, the Act is an important step toward the District making the best use of micromobility to advance its objectives.

The Act also is a vital complement to the safety measures that Lime is already taking. We have been successful in these efforts. According to a study released by the Baltimore City Department of Transportation this spring, available data indicated that scooters had a comparable safety record to other forms of transportation.[1] In fact, scooters were involved with fewer injuries than walking and far fewer injuries than driving. At the same time, like this Committee, we recognize that safety is a shared responsibility. The District has an important role to play in ensuring that our infrastructure—both physical and legal—is adequate to protect all road users. This Act is a key part of this infrastructure that will make District's transportation network safer and more equitable for all.

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[1] Baltimore City Dep't of Transp., *Dockless Vehicle Pilot Program: Evaluation Report* 15 (Mar. 2019), *available at* https://transportation.baltimorecity.gov/sites/default/files/Pilot%20evaluation%20report%20FINAL.pdf.

Lime strongly supports the Vulnerable User Collision Recovery Amendment Act, including its language as introduced, as well as the broader efforts of members of this Committee to ensure that shared micromobility is a transportation option for all D.C. residents. This includes the Committee on Transportation and the Environment's budget recommendations to increase the speed limit for electric scooters and launch a scooter parking pilot program. It also includes Councilmember Allen's comments to DDOT on its then-proposed dockless regulations, calling for an increased cap on the number vehicles and mechanisms to allow compliant companies to increase their fleets quickly. Throughout this time, members and staff have engaged with us to discuss how Lime can better serve the District. These actions demonstrate a recognition that shared micromobility has value for the District and will be a long-term fixture in the District's transportation network.

Thank you for the opportunity to testify.

Dear Councilmember Allen,

I commute daily either riding bicycles or scooters and I have to ride defensively and aggressively to protect my life. Every day there are hostile drivers who pass me too closely, suddenly cut in front of me to make right hand turns, scream profanities at me just for existing, open car doors without checking their mirrors, or simply are too distracted to notice me. I have made my share of mistakes as well and by grace I have not been seriously injured or killed.

It seems ridiculous to me to hold cyclists responsible for injury or death when they are hit by vehicles. Even if the cyclist makes a mistake and did not see the oncoming car when they darted across an intersection, the driver of the vehicle should be alert and forgiving. The point that most people seem to miss is that when cyclists make a mistake, they are injured or die but when drivers make a mistake, they kill or hurt others. E-bikes and e-scooters are no different than non-electric bikes and scooters in this regard.

Riding bikes and scooters is good for the environment and more residents should feel that this is a safe option. Currently, however, there is little incentive to ride bikes and scooters when the risk of injury is high and the lack of concern and care for each other is perpetuated by policies that value property and "rights" more than people.

Please extend protections to e-bike and e-scooter riders by passing the Vulnerable User Collision Recovery Amendment Act of 2019.

If pedestrians and cyclists can recover their losses from medical charges and property damage in a collision, those protections should be extended to e-scooter and e-bike riders as well.

Please note my support for this legislation.

Thank you for your leadership,
Navya Crick

Dear Councilmember Allen,

Please extend protections to e-bike and e-scooter riders by passing the Vulnerable User Collision Recovery Amendment Act of 2019.

If pedestrians and cyclists can recover their losses from medical charges and property damage in a collision, those protections should be extended to e-scooter and e-bike riders as well.

Please note my support for this legislation.

Thank you for your leadership,
Ryan Evans

Dear Councilmember Allen,

Please extend protections to e-bike and e-scooter riders by passing the Vulnerable User Collision Recovery Amendment Act of 2019.

If pedestrians and cyclists can recover their losses from medical charges and property damage in a collision, those protections should be extended to e-scooter and e-bike riders as well.

Please note my support for this legislation.

Thank you for your leadership,
Xander Saide

Dear Councilmember Allen,

Please extend protections to e-bike and e-scooter riders by passing the Vulnerable User Collision Recovery Amendment Act of 2019.

If pedestrians and cyclists can recover their losses from medical charges and property damage in a collision, those protections should be extended to e-scooter and e-bike riders as well.

Please note my support for this legislation.

Thank you for your leadership,
Federico Brusa

Dear Councilmember Allen,

Please extend protections to e-bike and e-scooter riders by passing the Vulnerable User Collision Recovery Amendment Act of 2019.

If pedestrians and cyclists can recover their losses from medical charges and property damage in a collision, those protections should be extended to e-scooter and e-bike riders as well.

Please note my support for this legislation.

Thank you for your leadership,
Christopher Semenas

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June 24, 2019

Honorable Charles Allen
Council of the District of Columbia
Chairman, Committee on the Judiciary and Public Safety
1350 Pennsylvania Avenue, NW, Suite 110
Washington, DC 20004

RE: Vulnerable User Collision Recovery Amendment Act

Dear Chairman Allen:

The District of Columbia is a city looking toward the future with alternate transportation solutions - including bicycles, ebicycles and scooters. It is vitally important for the legislature to review the laws that apply to these alternatives; however, our Association has two concerns regarding bill 23-83 the Vulnerable User Collision Recovery Amendment Act. First, we are concerned that expanding the definition of "vulnerable user" to include electric scooters is premature. This mode of transportation is relatively new to our city and to many other jurisdictions. As a result, our city agencies have not had time to draft, review and establish regulations for the scooters. Providing scooter riders with special legal standards is premature until these regulations have been established and fully vetted.

Our second concern relates to language in the bill that could potentially lead to confusion. To clarify that users of motorized wheelchairs will continue to be protected in this section of the Code and in other areas of the Code, the phrase "electrically-powered wheelchair" should not be listed in the exclusions to the definition of "electric mobility device user" in bill 23-83 section 2(a). The section of the D.C. Code amended by bill 23-83 includes protections for "pedestrians" (see D.C. Code §50-2204.51(3)). The term "pedestrian" is defined in 18 DCMR §9901.1 as "any person afoot or who is using a wheelchair or motorized wheelchair." Therefore, motorized wheelchair users are already protected under the current vulnerable user law, as amended in 2016, and referring to those users with a slightly different term in the same Code section under the definition of "electric mobility device user" will create confusion.

The intent of current legislation will be preserved with the changes to bill 23-83 noted below:

> Section 2(a) Section 2 (D.C. Official Code §50-2204.51) is amended by adding a new paragraph (5) to read as follows"
> (5) "Electric mobility device user" means an individual using an electric scooter or battery-assisted bicycle, but shall not include a motorcycle~~,~~ or moped~~, or electrically-powered wheelchair~~."

Respectfully yours,

Trial Lawyers Association of Metropolitan Washington, DC

Julie Mitchell Newlands
President

Christopher T. Nace
Chair, Legislative Committee

cc: Members of the Committee on the Judiciary and Public Safety

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Transportation

Public Hearing on
B23-083, the "Vulnerable User Collision Recovery Amendment Act of 2019"

Testimony of
Dena Iverson
Chief of External Affairs

Before the
Committee on Judiciary and Public Safety
Council of the District of Columbia
The Honorable Charles Allen, Chairperson

John A. Wilson Building
Room 120
1350 Pennsylvania Avenue, NW
Washington, DC 20004

June 24, 2019, 2019
10:30 A.M.

Good morning, Chairperson Allen, members, and staff of the Committee. I am Dena Iverson, Chief of External Affairs at the District Department of Transportation, or DDOT. I am pleased to testify before you today on behalf of Mayor Bowser's Administration regarding B23-083, the *Vulnerable User Collision Recovery Amendment Act of 2019.*

Position and Technical Amendment

From a broad perspective, DDOT supports encapsulating users of this new shared-mobility technology in the modified comparative negligence standard applied to cyclists and pedestrians, as they are equally as vulnerable when navigating the public space. Accordingly, parity in treatment under the law is equitable and would benefit this class of road users. However, DDOT recommends a technical amendment regarding the definition of "electric mobility device user" as this new term may cause confusion on how electric scooters and battery-assisted bicycles are defined.

This bill defines "electric mobility device user" as "an individual using an electric scooter or battery-assisted bicycle..." This language causes confusion because electric scooters and battery-assisted bicycles are already captured in the current definition of "personal mobility device" or "PMD." A PMD is defined as

1) A motorized propulsion device designed to transport one person

or2) a self-balancing, two non-tandem wheeled device, designed to transport only one person with an electric propulsion system, but does not include a battery-operated wheelchair.

"PMD" is the term currently used to reference, regulate, and identify vehicles in the dockless program; therefore, its use in this bill would maintain clarity and continuity surrounding the District's approach these vehicles. Furthermore, the term "electric mobility device," itself, is currently not defined by law, meaning that "electric mobility device user" identifies the user of a device that, itself, remains undefined.

As such, DDOT recommends that the term "electric mobility device user" be removed from the bill and replaced with "personal mobility device" or "PMD" because its current definition captures the intended devices.

This concludes my testimony. Thank you for allowing me the opportunity to testify before you today. I am available to answer any questions that you may have.

Statement on behalf of the
American Civil Liberties Union of the District of Columbia
before the
DC Council Committee on Judiciary and Public Safety
Hearing on Bill 23-134, "The Community Harassment Prevention Amendment Act of 2019"
Monday, June 24, 2019
by
Nassim Moshiree, Policy Director

My name is Nassim Moshiree, and I am the Policy Director of the American Civil Liberties Union of the District of Columbia (ACLU-DC). I submit the following testimony on behalf of our more than 14,000 members in the District.

The ACLU is committed to working to reverse the tide of over-incarceration, safeguard fundamental liberties, eliminate racial disparities, and advocate for sensible, evidence-based reforms to policing and criminal justice policies.

The ACLU-DC has both constitutional and public policy concerns about Bill 23-134, "The Community Harassment Prevention Amendment Act of 2019," introduced by Chairman Mendelson at the request of Mayor Bowser. The intended purpose of Bill 23-134, as expressed by the Administration in its letter to the Council, is "to provide additional safeguards for protected classes against bias-related crimes in the District."

The bill purports to do this in two primary ways:

1) It expands the District's "Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty" statute (DC Code § 22-3312.02(a)) to apply to any private or public property in the District and amends the law to include threats of harm or damage to property in addition to threats to persons.[1]

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[1] Current DC Code § 22-3312.02(a) states: It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, religion, or any other category listed in § 2-1401.01, or on any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to, a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or simulated, where it is probable that a reasonable person would perceive that the intent is:

(1) To deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing to all persons within the District of Columbia equal protection of the law;

2) It creates a new offense of "Harassing an Entity" under DC's existing stalking statute (DC Code § 22-3131) and adds a new penalty provision specific to this new offense.

I will focus this testimony on our overarching concerns about the latter provision, namely that the language creating this new offense is vague, overly broad, and could have the unintended consequence of chilling and criminalizing constitutionally protected speech.

First, the very definition of "entity" in the bill is vague and confusing.[2] The intent of the law is to protect the "members, participants, or employees" of an entity but the section as written proscribes "harassing an entity" which is not something that can be harassed. It is also unclear how someone could harass an entity without separately harassing the people belonging to that entity, which would already be covered by DC's existing stalking statute, making this provision unnecessary.

A new subsection in the "harassing an entity" provision codifies a rationale for this offense to be "helping to ensure that individuals can safely assemble to advance their common interests." This is incredibly broad, and its meaning is not limited to any specific type of assembly or class or association, but additionally, the conduct proscribed by the bill does not have a direct connection to this stated purpose of ensuring people can safely assemble. For example, someone could be guilty of the offense of "harassing an entity" by engaging in some unnamed conduct that does not necessarily cause a person to fear for her safety, either individually or in assembly.

The standard under which someone could be charged with violating this offense is also concerning. An individual can be held liable of this offense by negligently causing emotional distress to the members, participants, or employees of an entity by engaging "in a course of conduct" directed at that entity. In the proposed bill, an offense is committed if a person is made to feel "*seriously* alarmed, disturbed, or frightened," but also if a person is made to "suffer emotional distress," with no adjective. It should be noted that some form of emotional distress is a normal byproduct of speech we don't like and must be tolerated. Even the torts of intentional or negligent infliction of emotional distress require "severe" distress; it shouldn't take less distress to send a person to prison than to make her liable for civil damages. Under

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(2) To injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;
(3) To threaten another person whereby the threat is a serious expression of an intent to inflict harm; or
(4) To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability.

[2] An "Entity" is defined in the bill as "a group organized by association for any established purpose, including, but not limited to a religious, social, educational, or recreational purpose." It's not clear what would qualify as an "established" purpose and what would not.

the terms of this bill, a person who says "the Republican Party is responsible for killing innocent immigrant children" could be convicted of harassment by making some Republicans feel emotionally distressed. Truth would not be a defense.

Most significantly, the new offense in question raises first amendment concerns about criminalizing speech solely based on its viewpoint. A person could be arrested under this statute for standing outside a fast-food eatery with a sign saying "eating hamburgers kills innocent animals" (which might make employees feel distressed), while a person would not be liable for standing outside the same business with a sign promoting its business.

The bill's exception clause stating that the "harassing an entity" section "does not apply to constitutionally protected activity," is insufficient to protect against concerns that the bill may criminalize speech based on its content. We would not accept a law that provided, "saying something to an officer that the officer doesn't like is a crime, unless it is constitutionally protected." Importantly, this exception clause would not prevent arrest and prosecution of individuals engaged in the conduct proscribed by the bill, even if they are ultimately acquitted on the ground that they were exercising a constitutionally protected right. We cannot expect law enforcement officers to be constitutional scholars to know whether an individual has committed a crime, nor should we expect the individuals engaged in the conduct to be constitutional scholars. If enacted into law, this bill could have a serious chilling effect on protected speech and lead to self-censorship and would likely be subject to constitutional challenges on those grounds.

Conclusion:

The DC Council should exercise caution in moving forward with any legislation that would further expand D.C.'s existing stalking statute in a way that is not narrowly tailored and has not adequately considered potential infringement on constitutionally protected speech, as is the case with Bill 23-134.

We understand the D.C. Criminal Code Reform Commission will be issuing a report on its recommendations for reform of the District's Criminal Code by the close of Fiscal Year 2020. We ask that this Committee await the release of that report before moving forward with any measures that seek to expand criminal penalties for conduct in the District.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

June 24, 2019

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W. Suite 504
Washington, D.C. 20004

RE: Bill 23-134 *Community Harassment Prevention Amendment Act of 2019*

Dear Chairman Mendelson:

The Office of the Attorney General (OAG) supports the *Community Harassment Prevention Amendment Act of 2019* (Bill 23-134). Bill 23-134 seeks to amend D.C. Code § 22-3312.02(a) and the *Omnibus Public Safety and Justice Amendment Act of 2009* by adding "harassing an entity" to the District of Columbia Official Code.

Bias-related crimes are on the rise both nationally and in the District. According to the Metropolitan Police Department, there were 205 reported bias-related crimes in 2018. As of May 31, 2019, there have been 90 reported bias-related crimes in the District this year. These crimes are reprehensible and run contrary to public safety. Bill 23-134 will offer broader and newer protections for District residents. Bill 23-134 will expand protections from defacement of public and private property to clarify that businesses, stadiums, museums, and utility-owned poles are included within the ambit of this offense. For the sake of clarity, OAG suggests that the proposed language in lines 21-22 be amended as follows (strikethrough and new language bolded):

> It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a religious or secular symbol on any private property of another without the permission of the owner or the owner's designee or on any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, ~~symbol,~~ emblem, or other ~~physical impression~~ **symbol** including, but not limited to: a Nazi swastika, a noose, or any manner of exhibit which includes a burning cross, real or simulated, where it is probable that a reasonable person would perceive that the intent is:"

The proposed amendment would make it clear that the sign or mark does not have to be a "physical impression" left on a structure. Under this amendment the projection of noose, for

example, on a building to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws would be covered.[1]

Presently, persons associated with entities are not protected by the stalking statute, D.C. Code § 22-3133. As a crime, "harassing of entity" will enable law enforcement and prosecutors to assist during instances where an entity is purposefully targeted by a criminal course of conduct with the intent to make the entities' members fear for their safety; feel seriously alarmed, disturbed, or frightened; or to suffer emotional distress.[2]

To remove a redundancy, OAG suggests that the proposed language in line 40 read as follows (strikethrough):

> "Entity" means a group organized by association for any established common purpose, including~~, but not limited to~~ a religious, social, educational, or recreational purpose."

The words "but not limited" in the existing text is superfluous. The word "including" necessarily includes that concept.

If passed, OAG would have jurisdiction to prosecute these types of offenses when committed by a person who is under the age of 18. OAG has rarely been presented with crimes pursuant to D.C. Code § 22-3312.02(a). However, OAG is committed to addressing bias-related crimes and harassment of an entity and will incorporate plans to combat these offenses into our rehabilitative plans for juveniles.

Sincerely,

Karl A. Racine
Attorney General for the District of Columbia

[1] See D.C. Official Code § 22–3312.02 (a)(2).
[2] See lines 46 through 59 of the Bill.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

METROPOLITAN POLICE DEPARTMENT

Public Hearing on

Bill 23-134, the Community Harassment Prevention Amendment Act of 2019

Testimony of
Ms. Kelly O'Meara
Executive Director, Strategic Change Division

Before the
Committee on the Judiciary & Public Safety
The Honorable Charles Allen, Chair

Hearing Room 120
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, DC 20004

10:30 am
June 24, 2019

Good morning, Chairperson Allen, other members, staff, and guests. My name is Kelly O'Meara, and I am the Executive Director of the Metropolitan Police Department's Strategic Change Division. I am here to discuss Bill 23-134, the *Community Harassment Prevention Amendment Act of 2019*, a bill that will close gaps in the District's law dealing with offenders trying to intimidate or cause fear in our communities.

Reports of bias-related crimes and incidents have increased in the District – and the country – in the past three years. Each hate crime takes a toll not only on the victim, but also on the community. Mayor Muriel Bowser and Chief Peter Newsham have made it a priority to provide support to individuals and communities that have been targeted by hate and bigotry. The diversity and tolerance of our residents is what makes DC vibrant, welcoming, and exceptional. As Mayor Bowser says, these are DC Values. That is why it is shocking for us to see an increase in hate crimes in our city. We will not accept this as a new norm. The proposed legislation will help us to protect our communities from hate, and to hold accountable individuals who try to harass and intimidate them.

The *Community Harassment Prevention Amendment Act* includes two primary provisions to protect communities in the District from targeted harassment. First, it amends the *Omnibus Public Safety and Justice Amendment Act of 2009* (D.C. Law 18-88; D.C. Official Code *passim*), to create the offense of Harassing an Entity. Second, it amends section 3(a) of the *Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982* (D.C. Law 4-203; D.C. Official Code § 22-3312.02(a)) to expand the types of property on which it is unlawful to burn or desecrate religious or secular symbols, or to display certain emblems such as nooses, Nazi swastikas, or burning crosses.

While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias-related crimes is equally troubling. As an initial matter, it is important to understand what is – and is not – a hate crime. First and foremost, the incident must be a crime. Although that may seem obvious, most speech is not a hate crime, regardless of how offensive it may be. In addition, a hate crime is not really a specific crime; it is a designation that makes an enhanced penalty available to the court.[1] In short, under the law, there is no specific "hate crime," but rather a crime motivated in whole or in part by bias against the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim.[2]

There have been several incidents in the District over the past two years that may not be criminal, but have caused targeted communities to be fearful. Organizations have been targeted

[1] If a person is found guilty of a bias-related crime, the court may fine the offender up to 1½ times the maximum fine and imprison him or her for up to 1½ times the maximum term authorized for the underlying crime.

[2] Bias-Related Crime Act of 1989 (D.C. Official Code § 22-3700 *et seq.*)

with repeated harassing phone calls and letters, causing alarm among employees and members. For example, in 2017, a synagogue in the District received a series of letters that did not rise to the level of a direct threat, but were certainly concerning, especially in totality. As we reviewed the letters, MPD spoke with our partners at the Office of the Attorney General and the United States Attorney's Office to determine whether this course of conduct could be considered a violation of the District's stalking law (D.C. Official Code § 22-3133) even though the law protects an "individual." Attorneys agreed that it was unclear whether the current statute would extend to the same behavior targeting an organization. As a result, MPD worked with our partners to develop this legislation as a remedy for entities vulnerable to serious incidents of repeated harassment and implied threats.

This offense mirrors the District's existing stalking offense, and prohibits a person from purposefully engaging in a course of conduct directed at a specific entity with the intent to cause members, participants, or employees of that entity to fear for their safety, feel alarmed, disturbed or frightened, or suffer emotional distress. A course of conduct requires three or more incidents. This legislation provides law enforcement with a tool for combatting harassment to ensure that individuals can associate or assemble free from repeated and targeted threats or intimidation.

Several hate crimes two years ago prompted the proposal to amend the District statute on burning or desecrating religious or secular symbols, or displaying certain emblems such as nooses, Nazi swastikas, or burning crosses. The offense applies where a reasonable person would perceive the intent is to:

- Deprive someone of equal protection of the law;
- Intimidate or cause fear in a person; or
- Threaten to harm a person or damage property.

As you may recall, in 2017, a series of nooses and Nazi swastikas were displayed at various locations in the city. Fifteen nooses were found at museums, monuments, universities, construction sites, and other locations. Swastikas were also displayed in a dozen cases. The current statute prohibits activities such as burning or desecrating religious or secular symbols, or displaying certain items, such as a noose, Nazi swastika, or burning cross, on private premises or property in the District primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, with the above referenced intent.

Most often the swastika cases involved graffiti, so there was a clear crime of damaging or destroying property. The nooses, however, did not involve damage to, or destruction of, property, so it was not clear that the District could hold someone accountable for hanging nooses at construction sites, or on utility wires or trees. Other examples of uncovered property might include movie theaters or sports arenas, which may be privately owned but are also open to the public. The proposed language would close this gap by prohibiting these activities or displays on any private property of another without the permission of the owner or the owner's designee, or

on any public property in the District of Columbia. In addition, the Administration proposes that the display of certain emblems statute include the intent to threaten not only another person, but also his or her property. A burning cross may only demonstrate a threat to property, but it would be alarming nonetheless.

These changes are all the more important because of the increasing prevalence of bias-motivated crimes and incidents in the District, which, unfortunately, mirrors national trends. The Department is a recognized leader in identifying bias-related crimes and supporting targeted communities. In 2015, MPD conducted training for all its members in identifying and reporting hate crimes. This training is reinforced periodically throughout the year.

The comprehensive process begins with our electronic records management system that requires officers to complete a mandatory field noting whether the incident included any indicators of potential bias for all police reports. Officers notify the Special Liaison Branch[3] so that members can work with the victim and the community, and detectives, who conduct a thorough investigation into both the criminal elements and the possible motive. Importantly, it is not up to a patrol officer to conclude whether a crime is motivated by bias, but only to note that there may be hate crime indicators. All potential hate crimes are reviewed by a panel consisting of the Criminal Investigations Division, Strategic Change Division, Intelligence Branch, and Special Liaison Branch, to ensure information is being shared and provide consistency in classifying hate crimes. MPD posts summary data of hate crimes on our website each month, and more detailed open data each quarter. This is available at mpdc.dc.gov/hatecrimes.

The number of hate crimes has grown from 66 in 2015 to 205 in 2018. Reports of hate crimes have continued to grow, increasing 55 percent in the first five months of 2019. Crimes based on ethnicity or national origin have increased the most, but crimes based on a bias against sexual orientation or gender identity are consistently the largest category of hate crimes.

Dating back to the 2016 election, members of some of our most vulnerable communities became more concerned and fearful. As a result, after meeting with representatives from the African, Asian, deaf and hard of hearing, Latino, and LGBT communities – all of which are served by MPD's special liaison programs – Chief Newsham moved MPD's Special Liaison Branch directly under his office under my supervision at the end of 2016. The change has helped

[3] The Special Liaison Branch (SLB) serves the African, Asian, deaf and hard of hearing, LGBT, Latino, and religious minority communities. The SLB works closely with historically underserved communities, serving as a model for community policing. Members respond to crime scenes and incidents to support members of our community, whether they are arrestees, victims, or surviving family members. The SLB works closely with MPD's Victims Services Unit and community organizations to ensure that crime victims have access to services. The Branch also works to support the community with incidents that are not necessarily criminal, such as with death notifications to family members, or in working to help locate missing persons. More proactively, SLB hosts and participates in meetings and presentations, providing the community with public safety materials and information that will help promote a better understanding of interacting with MPD members in criminal and casual contact situations.

to raise the profile of these issues in the Department so that the liaison units have greater access to coordinate with all bureaus.

My team and I have been able to expand our reach in part because of the leadership and partnership with key leaders in Mayor Bowser's office. Together, we have developed proactive efforts and initiated rapid responses to emerging issues. In 2017, the Monica Palacio, Director of the Office of Human Rights, led the Mayor's DC Values in Action initiative. Director Palacio worked closely with MPD and others to coordinate critical information for District agencies and the public to know about how to respond to a hate crime or hate speech targeting people or property. As a result, the team developed a Hate Crime Protocol to ensure timely coordinated responses from District agencies.

We have also responded quickly to urgent concerns from the community. For example, in the immediate aftermath of the January 2017 attack on a mosque in Quebec and the presidential Executive Orders on travel restrictions from predominantly Muslim countries, we partnered with Reverend Thomas Bowen, the Director of the Mayor's Office of Religious Affairs. By visiting with mosques and Islamic centers throughout the city, Rev. Bowen helped MPD to strengthen connections with members of the Muslim community. Reverend Bowen, Director Palacio, and MPD have also hosted several weekend conference calls with religious leaders in response to attacks on religious communities in other parts of the country.

In 2018, the Office on Human Rights held two Listening Labs to have substantive and meaningful dialogue with residents and community-based leaders to address complex and painful topics such as the impacts of racism, anti-Semitism, xenophobia, and homophobia. The goal of the labs is to provide a safe and productive environment so that District government officials, residents, and local community leaders can engage in productive and respectful dialogue about the city's values, such as inclusion and equity for all. The Labs are designed to engage community leaders in all eight wards.

Intolerance, bigotry, and crimes motivated by bias or hate have no place in our vibrant city. The District of Columbia is committed to protecting its diverse communities, and discouraging anyone from harassing a community, causing reasonable people to fear for their personal safety or the safety of others. I would like to thank you for providing this opportunity to discuss some of the efforts to combat hate crimes in the District. I urge the Committee on the Judiciary and Public Safety to take up this legislation as soon as possible in the fall to help us in the effort. In the meantime, I am happy to address any questions that you may have.

THE
PUBLIC
DEFENDER
SERVICE
for the District of Columbia

CHAMPIONS OF LIBERTY

COMMENTS OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

COMMUNITY HARRASSMENT PREVENTION ACT OF 2019
BILL 23-134
Presented by

Katerina Semyonova

before

COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

June 24, 2019

Avis E. Buchanan, Director
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Thank you for the opportunity to testify on Bill 23-134, the Community Harassment Prevention Act. I am Katerina Semyonova, Special Council to the Director on Policy and Legislation at the Public Defender Service for the District of Columbia. Bill 23-134 raises core First Amendment concerns by criminalizing speech based on its content. The First Amendment problems with this bill are not solved by its broad exception for protected speech. To the extent that Bill 23-134 prohibits communication and actions that are not protected by the First Amendment, many of those acts are already criminalized by existing statutes.

Bill 23-134 creates the offense of harassing an entity. The bill vaguely defines "entity" as a group organized for any established purpose. The offense would prohibit an actor from engaging in a "course of conduct" that intentionally, knowingly, or even negligently causes a reasonable person who is a member, participant, or employee of the entity to fear for their safety, feel seriously alarmed, or suffer emotional distress.[1] Importantly, the definition of "course of conduct" includes on two or more occasions, "communicat[ing] to or about another person."[2]

Bill 23-134 would criminalize, for example, the act of standing outside of a bakery that refused to bake a cake for a gay wedding and communicating to others the need to boycott that baker's business. The communication is criminalized because it would cause the baker to suffer emotional distress over the loss of business revenue. At the same time, Bill 23-134, would not criminalize the conduct of standing outside of the

[1] Bill 23-134.

[2] D.C. Code § 22-3132, Stalking (definitions).

bakery and telling employees or people who happen to pass by the bakery about the amazing skills of the baker.

The First Amendment precludes the enactment of laws "abridging the freedom of speech."[3] As a result of the First Amendment, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[4] Content-based laws, which target speech based on its communicative content, are presumed to be invalid.[5] Bill 23-134, establishes a content-based law, prohibiting negative speech that may negligently cause emotional distress, while leaving untouched positive or supportive speech.

It is not dissimilar from a federal law that prohibited the Patent and Trademark Office from registering any trademark "which may disparage ... persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[6] In 2017, the Supreme Court struck down that law. It held that the law "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[7] As such, the law could not survive intermediate scrutiny applied to commercial speech, let alone strict scrutiny applied to speech by individuals.[8]

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[3] United States Constitution, Amendment I.

[4] *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal citations omitted).

[5] *Stevens v. United States*, 559 U.S. 460, 468 (2010).

[6] *Matal v. Tamm*, 137 S.Ct. 1744, 1753 (2017).

[7] *Id.* at 1751. *See also, Street v. New York*, 394 U.S. 576 (1969), "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'"

[8] *Matal*, 137 S.Ct. at 1764.

Even if the Council could prohibit some of the conduct contained in Bill 23-134, for instance, the prohibition of a course of conduct that includes threats, given the flaws outlined above, the entire statute would susceptible to a challenge for overbreadth. A statute will be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[9] In 2017, the Illinois Supreme Court considered the constitutionality, on overbreadth grounds, of a stalking statute that Bill 23-134 mirrors in substantial part. The Illinois statute addressed the stalking of individuals rather than entities, but the difference is of little import since Bill 23-134 also targets individuals, but focuses on individuals who are connected with an "entity." The Illinois Supreme Court invalidated the stalking statute as overbroad, finding that the communication language prohibited a range of speech - including attending a public meeting and repeatedly complaining about pollution caused by a local business - that was at the heart of the First Amendment's protections.[10]

The Illinois statute was not saved by a provision that stated: "this section does not apply to an exercise of the right to free speech or assembly that is otherwise lawful." Bill 23-134, similarly cannot be saved by its language that states that: "this section does not apply to constitutionally protected activity." The exception to liability functions only as an affirmative defense at trial. It does not prevent the arrest and prosecution of individuals engaged in constitutionally protected activity. As the Illinois Supreme Court noted, "the exemption cannot eliminate the chilling effect on protected speech and the

[9] *Stevens v. United States*, 559 U.S. at 473.

[10] *People v. Relerford*, 104 N.E.3d 341, 354 (Ill. 2017).

resulting self-censorship."[11] Promises by the prosecution to prosecute only egregious cases of harassment rather than communication under this statute would be of no avail. As the Supreme Court stated in *United States v. Stevens*: "We would not uphold an unconstitutional law merely because the Government promised to use it responsibly."[12]

Rather than legislating now in this complicated area, PDS would urge this Committee to wait for the comprehensive report of the Criminal Code Reform Commission (CCRC), which will include recommendations for statutory language for the offense of stalking. Given the First Amendment problems with Bill 23-134, waiting for the CCRC's report is the appropriate course. In the meantime, the conduct prohibited in Bill 23-134, which would not be subject to First Amendment protections, such as threatening individuals, can be prosecuted under existing statutes including threats and disorderly conduct.[13]

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[11] *Id.* at 355.

[12] *United States v. Stevens*, 559 U.S. at 480. In *United States v. Stevens*, the Supreme Court invalidated on overbreadth grounds a federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. The law applied to any visual or auditory depiction in which a living animal is intentionally maimed, mutilated tortured or killed if the conduct violates federal or state law where "the creation, sale or possession takes place." As such, it prohibited the sale of all hunting magazines and videos in the District, since hunting is not legal in the District, and the depiction of the humane slaughter of a stolen cow.

[13] D.C. Code § 22–1810, prohibits threatening to kidnap or injure a person or damage his property. D.C. Code § 22-407 prohibits threats to do bodily harm. D.C. Code § 22-1314.02 prohibits interfering with a medical facility by obstructing passage, disturbing the peace, trespassing, telephoning the facility to harass owner, employees, or agents, and threatening to inflict injury. D.C. Code 22-1321, the disorderly conduct statute prohibits a wide array of conduct including acting in a manner such as to cause another person to be in reasonable fear that a person or property in a person's immediate possession is likely to be harmed, and engaging in loud, threatening or abusive language or conduct with the intent of impeding a lawful public gathering.

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D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrc.dc.gov

To:	Councilmember Charles Allen, Chairperson, Committee on the Judiciary and Public Safety
From:	Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission (CCRC)
Date:	Submitted June 19, 2019
Re:	Testimony for the June 24, 2019 Hearing on B23-134 – the "Community Harassment Prevention Amendment Act of 2019"

I. Introduction.

Thank you for the opportunity to provide written testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the "Community Harassment Prevention Amendment Act of 2019" (hereafter "bill"), to be held on June 24, 2019. I am presenting written testimony on behalf of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing comprehensive recommendations to reform the District's "substantive" criminal statutes—i.e., laws that define crimes and punishments.

To date, the CCRC has not submitted final recommendations to the Mayor or Council for the two offenses specifically amended by the bill: defacing or burning cross or religious symbol; display of certain emblems (D.C. Code § 22-3312.02); and stalking (D.C. Code §§ 22-3131 - 22-3135). However, the agency has completed research and *draft* recommendations on stalking, as well as related offenses likely to be committed as part of the behavior described by the bill, such as: trespass (D.C. Code § 22-3302); threats (D.C. Code §§ 22-407; 22-1810); and bias-related crime (D.C. Code §§ 22-3701 - 22-3703).

This testimony focuses on the bill's proposed language expanding the District's stalking statute, with only a few final remarks on the bill's expansion of D.C. Code § 22-3312.02. The analysis identifies a number of issues with the purpose, scope, and constitutionality of the bill's proposed changes.

II. The Bill's Purposes & Overview of Changes to Stalking Statutes.

The bill was introduced by Chairman Mendelson on behalf of the Mayor, whose letter accompanying the legislation made several statements about its purpose and the need for expansion of the stalking statute. Specifically, the introductory letter stated:

- "The bill seeks to provide additional safeguards for protected classes against bias-related crimes in the District."

- "Reports of bias-related crimes and incidents have increased significantly in the District - and the country - in the past two years. As we have seen all too clearly recently, from the murder of an African American couple in a Kroger parking lot to the horrific shooting at the Tree of Life synagogue that left 11 people dead, each hate crime takes a toll not only on the victim, but also on the community. I have made it a priority of my administration to provide support to our individuals and the community that have been targeted by hate."

- "While the rise in reported hate crimes has been disturbing, the harassing incidents that may not currently be covered by our extensive statute on bias related crimes is just as troubling. Organizations have been targeted for repeated harassing phone calls and letters, causing alarm among employees and members. However, the existing stalking statute (D.C. Code § 22-3133) protects an "individual," and it is unclear whether that will extend to the same behavior targeting an organization. As a result, the legislation seeks to serve as a remedy for entities organized by association for any established purpose that are vulnerable to serious incidents of harassment and implied threats. By providing law enforcement with a tool for combatting this harassment, it ensures that individuals can safely assemble to advance their common interests."

The bill would amend or supplement four of the five sections in the D.C. Code concerning stalking. Specifically, the bill:

1. Adds to the codified statement of legislative intent in D.C. Code § 22-3131: "*This title also provides law enforcement with a tool for combatting harassment of an entity, thereby helping to ensure that individuals can safely assemble to advance their common interests.*"

2. Adds to the definitions applicable to the stalking offenses, in D.C. Code § 22-3132: "'*Entity' means a group organized by association for any established common purpose, including, but not limited to a religious, social, educational, or recreational purpose.*"

3. Adds a new offense called "harassing an entity" that contains language identical to the current stalking statute except that it replaces references to a "specific individual" with references to a person's illicit course of conduct directed "*at a specific entity*" and causing fear of safety, alarm, emotional distress, etc. to the "*members, participants, or employees of that entity.*"

4. Adds a new offense penalty provision specific to the "harassing an entity" offense that contains language identical to the current stalking statute except that it again replaces references to a "specific individual" with references to "an entity's members, participants, or employees" and omits the current stalking statute's

provision that "a person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct."[1]

III. Bill Analysis.

The bill would specifically codify a different and much broader rationale for a harassing an entity offense than addressing hate crimes—namely, "helping to ensure that individuals can safely assemble to advance their common interests." In support of the bill, the Mayor's introductory letter states that bias-related crimes and incidents have increased significantly in the District and cites to national examples of hate crimes. However, the bill's changes to the stalking statute are not limited to stalking that is based on hate or bias, nor are the bill's changes limited to traditional "protected classes" based on race, religion, national origin, sex, age, etc. As with the current stalking statute, the bill's new stalking an entity offense does not require any hate or bias-related motive. The bill's definition of "entity" also is "a group organized by association for any established common purpose, including, but not limited to a religious, social, educational, or recreational purpose." While the scope of this definition is somewhat unclear,[2] the "association" apparently is not limited to any traditional class. Consequently, while it may be that some[3] hate or bias-related crimes would be subject to liability under the bill's new harassing an entity offense, the new offense purports to serve a broader, different purpose.

However, the conduct proscribed by the bill's harassing an entity statute is broader still, having no necessary connection to the stated rationale of protection of safe assembly. As with the current stalking statute, the bill's proposed offense would criminalize a course of conduct that is done with the intent, knowledge, or negligence that such conduct would cause a covered person to experience "fear for their safety."[4] Notably, however, there is no requirement in the bill or the current stalking statute that a person actually experienced such a fear for safety based on the accused's actions. The harassing an entity statute doesn't actually require proof that any individual feared for their safety. Moreover, there are several alternative bases of liability in the bill and the current stalking statute that go beyond concerns of safety, including a course of

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[1] The rationale for this omission is not obvious. It is unclear how stalking of a person and harassing an entity would differ with respect to the desirability of multiple punishments for identity theft and either stalking or harassment.

[2] The meaning of the phrase "group organized by association for any established common purpose" is ambiguous. It may be expansive enough to include casual friendships or narrow enough to require an externally-recognized, ongoing connection such as a sports team.

[3] For example, single-instance conduct that is bias-related would *not* satisfy the "course of conduct" requirement of the harassing an entity offense.

[4] *See Coleman v. United States*, 202 A.3d 1127, 1144 (D.C. 2019) ("The first type of mental harm listed in the stalking statute, "[f]ear for ... safety," is not defined in the statute. D.C. Code § 22-3133(a)(3)(A). The legislative-intent section of the stalking statute, however, states that the law was designed to prevent "severe intrusions on [an individual's] personal privacy and autonomy" and conduct that "creates risk to the security and safety of the [individual]." D.C. Code § 22-3131(a); see also Committee Report at 33 ("[T]he purpose [of the law] is to enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death."). Further, the Model Stalking Code Commentary provides the following examples of fears that would constitute fear for one's safety: "fear of death or serious physical harm," fear of sexual assault, fear that a child will be kidnapped or harmed, and "[f]ear of the unknown." Model Stalking Code Commentary at 39–40. Together, these sources indicate that fear for safety means fear of significant injury or a comparable harm. Moreover, they indicate that the stalking statute is meant to prohibit seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.").

conduct that would cause a covered person to "feel seriously alarmed, disturbed, or frightened"[5] or "suffer emotional distress."[6] The District of Columbia Court of Appeals (DCCA) summarized the mental harms as requiring something that "must rise significantly above that 'which [is] commonly experienced in day to day living,'" and "[o]rdinary 'uneasiness, nervousness, [and] unhappiness' are insufficient."[7] However the mental harm in stalking is characterized, it should be clear that the harassing an entity statute criminalizes a wide array of conduct that does not necessarily cause a person to fear for their physical safety, individually or in assembly.

The bill's harassing an entity statute newly criminalizes conduct and is not redundant with the scope of the current stalking statute. While the Mayor's introductory letter to the bill states that "the existing stalking statute (D.C. Code § 22-3133) protects an 'individual,' and it is unclear whether that will extend to the same behavior targeting an organization," the CCRC's analysis is that the current stalking statute in fact *does not* include organizations or an "entity" as defined by the bill as an "individual." There is no indication in the legislative history for the District's current stalking statute or the model statutes that were referenced in the legislative history that the stalking statute was intended to address stalking directed at an organization or other entity. Core behavior described in the stalking statute—e.g. "follow"—and the statute's reference to "personal identifying information" as defined in § 22-3227.01(3)—including, e.g., a birth certificate—are inconsistent with such a construction. Notably, the current stalking statute

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[5] *See Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019) ("There is much more limited guidance available about what it means to "feel seriously alarmed, disturbed, or frightened," the remaining form of mental harm listed in the statute. D.C. Code § 22-3133(a)(3)(B). But the D.C. Council's removal, in the current version of the statute, of liability for "seriously...annoy[ing]" conduct tells us that serious annoyance is insufficient. D.C. Code § 22-404(e) (2001) (defining "harass[ment]"—one of the ways in which a person could commit the crime of stalking under the old statute—as conduct that "seriously alarms, annoys, frightens, or torments"); see also District of Columbia Public Defender Service, June 2, 2009, Letter to Councilmember Phil Mendelson, attachment to Committee Report, at 3 (explaining that the United States Attorney's Office and the Office of Attorney General had "propos[ed]...replacing 'annoy' with 'disturb'" and that the Public Defender Service "prefer[ed] 'disturb' to 'annoy' because [it thought it] conveys a more serious effect"); Model Stalking Code Commentary at 39 ("[T]he stalking conduct needs to address behavior that goes beyond merely annoying the victim ...."). And the principle of noscitur a sociis suggests that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress. *See Burke v. Groover, Christie & Merritt, P.C.*, 26 A.3d 292, 303 n.8 (D.C. 2011) ("'The maxim noscitur a sociis, that a word [or phrase] is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word [or phrase] is capable of many meanings in order to avoid the giving of unintended breadth' to words in a statute." (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961)) (alterations in original)).").

[6] D.C. Code § 22-3132 (4) ("'Emotional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling"). See also, *Coleman v. United States*, 202 A.3d 1127, 1144–45 (D.C. 2019) ("This language indicates that the type of emotional distress that the victim must experience is high, reaching a level that would possibly *1145 lead to seeking professional treatment. See also Committee Report at 32 ("Stalking is a serious crime that often involves intimidation, psychological terror, and escalating severity."). The Model Stalking Code Commentary cites with approval Wallace v. Van Pelt, in which the court explained that "emotional distress" was "a general or specific feeling of mental anguish," "something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which [is] commonly experienced in day to day living." 969 S.W.2d 380, 386 (Mo. Ct. App. 1998) (emphases added), cited by Model Stalking Code Commentary at 49. Further, the Model Stalking Code Commentary sets forth the following examples of conduct that would cause "emotional distress": "making repeated telephone calls to a victim at a workplace, possibly endangering her job,...engaging in conduct that destroys the victim's credit history," and "plac[ing] [the victim] under constant surveillance." Model Stalking Code Commentary at 41, 49."); Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607 (2015).

[7] *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019)(internal citations omitted).

also does not characterize the victim as a "person," which would potentially allow for an inference that organizations were included.[8]

The conduct described in the bill's harassing an entity statute appears to criminalize a wide swathe of ordinary, constitutionally-protected First Amendment activity. For the most part, stalking statutes nationally have withstood constitutional challenges.[9] However, the language of stalking statutes varies considerably and courts in other jurisdictions have recently struck as unconstitutional[10] some uncommon language that, nonetheless, is in the District's current stalking statute and would be replicated in the bill's harassing an entity statute. First Amendment law is complex, but analysis by the Illinois Supreme Court of language almost identical to the formulation in District's stalking statute has been distilled in a helpful article by law professor Eugene Volokh as follows:[11]

1. "The statute is a content-based speech restriction, and thus presumptively unconstitutional." Communications that have pleasant content are not prohibited under the statutes, but communications whose content cause distress are prohibited.

2. The statute isn't limited to speech that falls within one of the few recognized exceptions to the First Amendment's protection recognized by the Supreme Court, including the "exception for true threats of illegal conduct" or "speech integrally related to criminal conduct." While the scope of these exceptions is a litigious matter, the breadth of the Illinois (and D.C.) stalking statute clearly exceeds those bounds.
3. The statute includes constitutionally protected forms of speech, including "political speech"[12] and non-political speech.[13]

4. "The statute isn't limited "to one-to-one communications," which might be restrictable under *Rowan v. United States Post Office Dep't* (which holds "that

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[8] *See* D.C. Code § 45–604 (General rules of construction for the D.C. Code state that: "The word 'person' shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.").

[9] Wayne R. LaFave § 16.4(b)The legislative response, 2 Subst. Crim. L. § 16.4(b) (3d ed.).

[10] *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019); *People v. Morocho*, 1-15-3232, 2019 WL 2438619 (Ill. App. Ct. June 10, 2019).

[11] *See* Eugene Volokh, *Ban on speech 'about a person' that negligently causes 'significant mental suffering, anxiety or alarm' struck down*, Washington Post (Nov. 30, 2017) (available online at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/30/ban-on-speech-about-a-person-that-negligently-causes-significant-mental-suffering-anxiety-or-alarm-struck-down/?utm_term=.976acd0dc7e7.).

[12] Volokh quotes the Illinois Court as stating: "For example, subsection (a) prohibits a person from attending town meetings at which he or she repeatedly complains about pollution caused by a local business owner and advocates for a boycott of the business. Such a person could be prosecuted under subsection (a) if he or she persists in complaining after being told to stop by the owner of the business and the person knows or should know that the complaints will cause the business owner to suffer emotional distress due to the economic impact of a possible boycott."

[13] Volokh quotes the Illinois Court as stating: "The Supreme Court has acknowledged that "most of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government regulation." Given the wide-ranging scope of the first amendment, its protection presumptively extends to many forms of speech that would fall within the broad spectrum of speech restricted by subsection (a)."

nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment")." Instead, the Illinois statute (as in D.C.) includes liability for communications "to or about" an individual and would include Facebook posts and signage displayed publicly.

There is no legally-recognized exception to First Amendment protection for even "hate speech" as generally understood.[14] Forceful, bigoted speech may reasonably be thought to cause a person severe emotional distress, yet even such speech is protected and cannot be specifically prohibited except where such speech constitutes a "true threat," "solicitation of a crime," or another recognized exception to First Amendment protection.[15] Of course, the bill's proposed statute reaches speech about a person that is far less condemnable than hate speech. Speech vilifying a business and its employees for environmental pollution, criticizing the performance of a healthcare facility, or remonstrating a governmental unit for ethical breaches may cause the members of those "entities" severe emotional distress.[16] However, there may be social benefits to such speech. Unfortunately, the proposed harassing an entity offense may be even more likely to involve political or religious forms of speech—e.g., harsh criticism of a political party or condemnation of a religion—than stalking directed at specific individual persons.

The proposed harassing an entity's statutory savings clause[17] *does not sufficiently shield such activity* from unconstitutionally chilling speech. As Professor Volokh recounted, the Illinois Supreme Court confronted a similar savings clause and found that: [18]

1. The statute can't be saved by the exception for "exercise of the right to free speech or assembly that is otherwise lawful." First, the exemption is simply "an affirmative defense that must be raised by a defendant at trial after a prosecution has been initiated. As such, the exemption cannot eliminate the chilling effect on protected speech and resulting self-censorship."

2. Second, "[t]he exemption does not prevent unwarranted prosecutions under a case-by-case application of the "communicates to or about" language. Nothing in the language of subsection (a) explicitly differentiates between distressing communications that are subject to prosecution and those that are not — and the State has not offered any guidance as to how Illinois citizens should tease out that difference. A case-by-case

[14] Again, law professor Eugene Volokh again has written an accessible summary of this point. *See, Eugene Volokh, No, there's no "hate speech" exception to the First Amendment,* Washington Post (May 7, 2015).

[15] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring); *see also State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977).

[16] Speech on public issues should be "uninhibited, robust, and wide-open...[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Connick v. Myers*, 461 U.S. 138 (1983) (internal quotation marks omitted)).

[17] D.C. Code § 22-3133(b) ("This section does not apply to constitutionally protected activity.").

[18] *See* Eugene Volokh, *Ban on speech 'about a person' that negligently causes 'significant mental suffering, anxiety or alarm' struck down,* Washington Post (Nov. 30, 2017) (available online at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/30/ban-on-speech-about-a-person-that-negligently-causes-significant-mental-suffering-anxiety-or-alarm-struck-down/?utm_term=.976acd0dc7e7.).

> discretionary decision by law enforcement officers and prosecutors does not solve the problem of the chilling effect on innocent speakers who fear prosecution based on negligently made distressing communications to or about a person. We conclude that [the exemption] is insufficient to remediate the extreme overbreadth of subsection (a) and cannot by itself make the terms of that provision constitutional."

Notwithstanding the Illinois Supreme Court opinion and critical legal scholarship, an overbreadth challenge of this type described above has not been brought to the D.C. Court of Appeals to date, so the District's statute remains untested.

The bill's harassing an entity statute may, in some instances, undermine the repeated victimization standard of the current stalking statute. The current stalking statute's statement of legislative intent recognizes that intrusions to personal privacy and autonomy must involve a "pattern" targeting the victim, and the elements of the offense require action on two or more occasions that is directed at the same "specific individual."[19] In contrast, the bill's harassing an entity statute does not require proof of a pattern of infringement against any specific individual. As there is no apparent requirement that the "specific entity" itself or its general membership experience a harm, one-time victimization of two persons in an entity (however narrowly or broadly that term is construed) is sufficient. While affected persons may suffer serious emotional distress from such one-time victimization, providing criminal liability for such an event runs counter to the two-or-more occasions standard of the current statute.

The bill's provisions amending the District offense of defacing or burning cross or religious symbol and display of certain emblems (D.C. Code § 22-3312.02) may not pose constitutional problems, however the bill's amendments do not cure other defects of the statute. While the CCRC has not fully evaluated or developed draft recommendations regarding D.C. Code § 22-3312.02, the statute may generally comport with the Supreme Court ruling in *Virginia v. Black*, 538 U.S. 343 (2003) upholding a cross-burning statute as a form of conduct that may be criminalized when conducted with intent to intimidate (a "true threat" exception to the First Amendment). However, relevant to a constitutional analysis and to the clarity of the offenses as a whole, the it must be noted that the bill does not specify complete culpable mental state requirements for the amended D.C. Code § 22-3312.02. As articulated in D.C. Code § 22-3312.02, the offense proscribes conduct "...where it is probable that a reasonable person would perceive that the intent is..." to intimidate, etc. However, it is unclear what intent or other mental state, if any, the offense requires, and that may be relevant as courts have only upheld a true threats exception to the First Amendment where based on at least recklessness.[20] The CCRC

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[19] The number of occasions involved in a relevant "course of conduct" under the District's stalking statute has recently been litigated. *See Coleman v. United States*, 202 A.3d 1127, 1142 (D.C. 2019) ("In sum, although the text of D.C. Code § 22-3133 is ambiguous as to whether a defendant can be convicted of stalking absent proof that he or she possessed a culpable mental state (an intentional, knowing, or "should have known" mental state) during at least two of the occurrences that comprise the course of conduct, the statutory definitions, the last-antecedent rule, the legislative history, and the rule of lenity lead us to conclude that the defendant cannot.").

[20] *See, e.g., United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005). *See, also, Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015) ("Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—awareness of some wrongdoing." Staples, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88

will engage in a more complete analysis of the offense if time permits under its statutory mandate.

IV. Closing.

While the goals of the proposed legislation are admirable, the CCRC's analysis has identified a variety of concerns about the specific language of the bill.

The scope, constitutionality, and effect of some provisions of the harassing an entity offense appear to be unrelated to or, in some cases, may conflict with, the stated goals of the legislation. I urge the Committee to review carefully the First Amendment implications of the new harassing an entity offense that is provided in the bill. Crafting criminal legislation that regulates speech is a notoriously difficult task that runs the risk of chilling the very rights of assembly and speech that one seeks to protect. The CCRC's draft recommendations to revise the District's stalking statute and explanatory legal commentary provide a solution for how a robust stalking statute can be fashioned that upholds First Amendment values.[21]

Moreover, the CCRC's analysis generally does not support the need for a new harassing an entity offense as described in the bill. I urge the Committee to consider carefully the rationale for creating a new harassing an entity crime, and to identify specific incidents in the District that have gone unprosecuted for want of the proposed harassing an entity offense. There are many other offenses that are currently available for prosecution of behavior that poses safety risks to individuals rights of association—e.g. criminal threats, trespass, disorderly conduct, stalking, and the second offense in this bill, defacing or burning cross or religious symbol and display of certain emblems (D.C. Code § 22-3312.02). The District's current criminal statutes for bias-related crime in D.C. Code § 22-3701 applies to all criminal acts, increasing the maximum authorized penalty by 50%.

Absent a clear need to address incidents in the District that cannot be prosecuted under other laws, I would recommend the Committee delay criminalizing new conduct under the bill's harassing an entity offense until it has the opportunity to review the CCRC's final recommendations for reform of the District's stalking statute. The CCRC's draft recommendations, which have already undergone a round of comments by the agency's Advisory Group and addresses a number of other changes to improve the statute besides those referenced in the analysis above. Final recommendations regarding the stalking statute and other offenses against persons are planned for release to the Council and Mayor by the close of FY 20.

L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., dubitante), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing Morissette, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288). *See* 1 C. Torcia, Wharton's Criminal Law § 27, pp. 171–172 (15th ed. 1993); Cochran v. United States, 157 U.S. 286, 294, 15 S.Ct. 628, 39 L.Ed. 704 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind"). Under these principles, "what [Elonis] thinks" does matter. App. 286.").

[21] The CCRC's latest draft recommendations regarding stalking and other statutes is available online at www.ccrc.dc.gov/node/1241216.

Thank you for your consideration. For questions about this testimony or the CCRC's work more generally, please contact our office or visit the agency website at www.ccrc.dc.gov.

Richard Schmechel
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Testimony of the Trial Lawyers Association of Metropolitan Washington, D.C.

Public Hearing: Bill 23-253 Alternative Service of Process of District of Columbia Residents Amendment Act of 2019
June 24, 2019
Committee on the Judiciary and Public Safety
Chairman, Councilmember Charles Allen

Good morning Chair Allen and members of the Committee. I am Daniel Singer, an attorney in D.C. at the law firm of Trombly & Singer, and I am a member of the Executive Committee of the Trial Lawyers Association of Metropolitan Washington D.C. In the audience today is Julie Mitchell Newlands, President of our Association and Christopher Nace, Chair of our Legislative Committee. I am pleased to be here to speak to you in support of bill 23-253 the Alternative Service of Process of District of Columbia Residents Amendment Act of 2019.

Mr. Chair, in my practice, I regularly represent people who have been seriously injured in motor vehicle crashes - as do the vast majority of my colleagues in the Trial Lawyers Association. A problem that my colleagues and I face in these cases is that, even when we know that there is insurance coverage for a particular at-fault driver and we have been in contact with that insurance company, a client's meritorious case can potentially be dismissed or significantly delayed if we cannot locate the individual at-fault driver to provide him or her with a copy of the lawsuit and summons personally, a

technicality required by current D.C. law. Unfortunately, obtaining personal service can be extremely challenging in some cases, as sometimes a year or two has passed since the crash and the at-fault driver no longer lives at the address listed on the crash report. In other cases, the defendant may live in a location like a secured apartment building, where there is no way to actually hand the at-fault driver the lawsuit and summons. There are also cases where we find out that the at-fault driver is intentionally evading service.

The requirement to personally serve an at-fault driver can produce unjust results. For example, the Arizona Supreme Court noted that one consequence of the requirement for personal service when the identity of the insurer is known is that "the defendant's absence [could cheat] justice, and both the defendant and the insurer [could] receive a windfall by a lawsuit dismissed for lack of service of process."[1] The Court explained further that, even if the Plaintiff could eventually find the Defendant after a lengthy search, this would "postpone [the] recovery for an injured plaintiff and make the case more difficult to prove because evidence may be lost and witnesses' memories fade."[2]

In recognition of the challenges of locating and personally serving at-fault drivers, the Council enabled enhanced methods of alternative service upon non-D.C. residents back in 2013, but it did not address the situation where an at-fault driver is a D.C. resident. Therefore, under current D.C. law, there is no mechanism to require an adverse insurance company to formally defend a lawsuit until a plaintiff's attorney can

[1] Walker v. Dallas, 146 Ariz. 440, 444 (1985).
[2] *Id.* at 444-45.

obtain personal service on the D.C. resident at-fault driver, even when we know that the at-fault driver is covered by a particular insurance company.

Bill 23-253 will address this situation by enabling substitute service on D.C. residents through the at-fault drivers' insurance companies. This type of substitute service would be limited to circumstances when the Plaintiff has shown due diligence in his or her efforts to locate and serve the at-fault driver and that those good faith efforts were unsuccessful. After the Plaintiff has made these good faith attempts at service and obtained court approval, service could then be completed by sending a copy of the lawsuit and summons to the Defendant's insurance company, or the lawyer representing the insurance company.

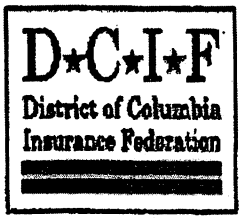
It is worth noting that this type of substitute service is not novel and the structure of this bill is entirely consistent with the Supreme Court's rulings on the due process requirements for service, which has typically focused on whether the method of service has a "reasonable probability of providing notice" to the Defendant. The Supreme Court has upheld statutes similar to this bill, and, in fact, the exact procedure outlined in Bill 23-253 is currently permitted in Maryland under the case of *Wiant v. Hudson*.[3] I have used this procedure in my practice in Maryland and I can attest that it makes the litigation process more efficient and cost-effective. Similar procedures are permitted in several other states, including Colorado, Michigan, New Jersey, and New York.

In conclusion, the proposed bill offers a solution to a potentially tricky problem when the victim of a motor vehicle crash cannot personally locate and serve the at-fault driver when the at-fault driver is a D.C. resident. I anticipate that, if passed, this bill will eliminate unnecessary delays in legal cases, enhance judicial efficiency, and ensure

[3] 643 A.2d 482, 485 (Md. Ct. Spec. App. 1994).

that our clients' cases can be tried on their merits rather than potentially be dismissed due to legal technicalities.

Mr. Chair, I thank you for the opportunity to present testimony today and I would be happy to take any questions that you may have.



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Testimony of

District of Columbia Insurance Federation

Submitted to the

DC Council Committee on the Judiciary and Public Safety

Public Hearing Held

24 June 2019

B23-253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019"

Good morning, Chairman Allen and members of the Committee on the Judiciary and Public Safety. My name is Wayne E. McOwen, and I represent the District of Columbia Insurance Federation (DCIF), a state insurance trade association whose members provide property, casualty, life and health insurance products and services in the District of Columbia.

On behalf of the DCIF, I offer the following remarks for your consideration in re B23-253, the "Alternative Service of Process on District of Columbia Residents Amendment Act of 2019."

A bedrock principle of due process is that a person being sued be personally aware that they are being sued so that they may answer the allegations. Accordingly, before a civil suit alleging damages against an individual may proceed, the defendant must be personally served with suit papers. It is not fair to saddle a defendant with a judgment or debt when they are not aware of the proceedings against them. District of Columbia Civil Rule of Procedure 4 requires service of process upon the individual or leaving the required suit papers with a person of suitable age and discretion at the defendant's residence within 60 days. Should service not be made during that time, a motion to extend that time frame along with a description of efforts made to effect service on the defendant is submitted to the Court. In this way, the Superior Court judge assigned to the matter is in the best position to assess whether good faith efforts to serve the defendant have been made. Per DC Code, 11-946, the Superior Court must follow the Federal Rules of Civil Procedure (FRCP) or prescribe or adopt a rule that modifies the Federal Rules. It is respectfully submitted that by law, only the Superior Court can change the rules of service of process.

The fact the Superior Court has not amended their current rules is telling. There should only be very limited exceptions to the fundamental rule. Neighboring states Maryland and Virginia have enacted statutes and rules that provide substitute service as a last resort when the defendant is actively evading service or good faith efforts to personally serve the defendant have failed. Those rules and statutes aim to provide means of service reasonably calculated to give actual notice to the defendant.

Bill 23-253 attempts to craft a similar solution, but, respectfully, we submit that it contains problematic provisions. The bill contemplates serving service of process on the

claims representative. In modern insurance practice, many representatives of an insurer handle aspects of the claim. It is suggested that service of process of suit papers on a property damage adjuster who handled a portion of the claim is not reasonably calculated to provide actual notice of the suit. Another troubling provision allows service of process on an attorney. Insurers often retain attorneys to provide coverage opinions that may touch on specific claims but don't represent the individual insured. They should not be deemed the agent of the insured for service of process. Furthermore, an attorney who is appointed to represent a defendant in a civil action should not be deemed that person's agent for service of process in perpetuity. It should also be considered that customers actively shop for coverage with different carriers. As there is a three- year statute of limitations in the District of Columbia, it is not unusual for a defendant named in a suit to no longer be a customer of the same insurer at the time service of process is attempted and the information possessed by the previous insurer may not be current.

In conclusion, the Rules have been promulgated to prevent District residents from being unaware of proceedings against them. It is our view that the Superior Court is in the best position to assess the need for any changes to its own Rules.

Thank you for the opportunity to provide testimony on this issue. I welcome your comments, questions regarding the above.

Statement of Catherine A. Jackson
Chief, Public Integrity Section - Public Advocacy Division
Office of Attorney General for the District of Columbia

Before the

Committee on the Judiciary and Public Safety
The Honorable Charles Allen, Chairperson

Public Hearing

on

Bill 23-300, the "Antitrust Remedies Amendment Act of 2019"

June 24, 2019
10:30 am
Room 123
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia 20004

Greetings Chairman Allen, Councilmembers, staff, and residents. I am Catherine A. Jackson, Chief of the Public Integrity Section in the Public Advocacy Division at the Office of the Attorney General ("OAG"). I am pleased to appear on behalf of Attorney General Karl A. Racine to testify in favor of Bill 23-300, the "Antitrust Remedies Amendment Act of 2019." Attorney General Racine cares deeply about ensuring District residents are not harmed by anticompetitive conduct in the District, and that which impacts District residents, and he is committed to policing anticompetitive activity under the District's Antitrust Act. This bill seeks to amend the Antitrust Act to authorize the Attorney General to seek civil penalties when OAG brings an antitrust lawsuit, and to expand the remedies provided by the Act.

The Public Integrity Section of OAG investigates and civilly litigates antitrust and competition issues in the District of Columbia. The District's Antitrust Act protects District residents, agencies, and businesses from anticompetitive practices such as price-fixing, market allocation, and monopolization that occur at least partly within the District. These kind of practices may result in inflated prices for products and services used by District residents, decreased supply or quality of these products or services, or the loss of innovation and competitive opportunity in the District's markets. Bill 23-300 will improve OAG's ability to enforce the District's antitrust law, by providing that companies or individuals that violate it will be subject to civil penalties and effective remedies.

The inclusion of civil penalties in state antitrust statutes is widespread; the District is one of only 9 jurisdictions that currently does not have a civil penalty provision. Accordingly, we are

seeking to add the civil penalty provisions to the Antitrust Act in order to strengthen OAG's enforcement authority and bring it into line with other states' authority. Authorizing OAG to seek civil penalties will assist us in justifying the enforcement costs of bringing antitrust cases. Antitrust investigations and litigations are very resource intensive, involving voluminous data, documents, and witnesses, and relying heavily on expert economic work. The ability to recover meaningful penalties in addition to other damages and costs enhances OAG's enforcement resources across the board. The inclusion of civil penalties also increases OAG's ability to engage in antitrust litigation that involves serious violations of antitrust law, but may result in only injunctive relief or very low damages. Finally, the proposed civil penalties provide another tool for the District to deter antitrust violations before they occur, by the existence of a monetary penalty for all violations of D.C. Code 28-4507.

The amount of the penalties in the requested amendment also are consistent with those imposed by similar jurisdictions. The Bill provides for civil penalties of up to $50,000 per violation for individuals, and up to $500,000 for corporations and other organizational entities. Antitrust penalties against individuals are relatively rare, but penalties against corporations are common and are typically sought in antitrust actions by state Attorneys General. Increasingly, states are recovering specific amounts identified as civil penalty payments in litigation and settlements. An antitrust violation, for purposes of calculating a civil penalty, generally is considered to be the anticompetitive agreement or action that gives rise to the harm, so there will be only one violation per case.

Attached to this written testimony is a chart prepared by OAG that identifies the relevant statute, penalty provisions, and penalty amounts throughout the country. The following are some examples from smaller-population States that shows that OAG's requested amendment is consistent with similarly-situated jurisdictions authority:

- Vermont: In 2016, Vermont increased its maximum penalties from $10,000 to $100,000.00 for an individual or $1,000,000.00 for any other person.
- Nebraska: In 2016, Nebraska increased its maximum penalty from $25,000 to $500,000.
- Utah: In 1991, Utah adopted maximum statutory penalties of $100,000 for an individual and $500,000 for a business entity.
- Connecticut: In 2009, Connecticut amended its state antitrust statutes to adopt maximum statutory penalties of $100,000 for an individual and $1 million for a business entity.

The Bill also expands the civil remedies available for violations of the Antitrust Act in two ways. First, the Bill provides for recovery of treble damages when OAG litigates on behalf of District government agencies. The current Act provides only for recovery of single damages when the District of Columbia is injured in "its business or property." D.C. Code § 28-4507(a). However, the Act does provide for recovery of treble damages in litigation by private parties, or by OAG as *parens patriae* on behalf of District consumers. D.C. Code §§ 28-4507(b), 28-4508(a). Harmonizing these two provisions will result in consistent remedies for violations of the Act, greater recoveries for District agencies that have been injured by antitrust violations, and provide an enhanced deterrent against violating the Antitrust Act.

Second, the Bill amends the Antitrust Act to explicitly include disgorgement within the injunctive or equitable relief remedies of D.C. Code § 28-4507(a). Disgorgement is an equitable remedy, separate from damages, that requires violators to pay their ill-gotten gains to the District. Disgorgement focuses on the benefits that the defendants improperly obtained, due to violating the law, rather than on quantifying specific injury to the District. A disgorgement remedy provides additional flexibility to OAG in obtaining remedies that are equitable and proportional to the facts of the case, and will be particularly effective in antitrust cases that may involve expert costs in excess of potential damages. The addition of an explicit disgorgement remedy strengthens OAG's ability to ensure that antitrust cases are resolved equitably, and in the public interest.

OAG urges the Council to approve Bill 23-300, and we look forward to working with the Committee on Public Safety and Justice to ensure this amendment is enacted to enable OAG to more effectively pursue antitrust cases. This concludes my testimony, and I am happy to answer any questions.

STATE CIVIL PENALTIES FOR RESTRAINT OF TRADE (ANTITRUST)

*Throughout, penalty amounts refer to corporations. Individuals may face lower fines.

STATE	STATUTE VIOLATED	PENALTY PROVISION	STATUTORY PENALTY AMOUNT
AL	Ala.Code 1975 § 8-10-1 *et seq.*	Ala.Code 1975 § 8-10-1 *et seq.*	Not less than $500 nor more than $2,000 for each offense
AK	Alaska Restraint of Trade Act (Alaska Stat. § 45.50.562 *et seq.*)	Alaska Stat. § 45.50.578(b)	Not more than $50,000,000
AZ	Uniform State Antitrust Act (Ariz. Rev. Stat. Ann. § 44-1401 *et seq.*)	Ariz. Rev. Stat. Ann. § 44-1407	Not more than $150,000 for each violation
AR	Ark. Code Ann. § 4-75-301 *et seq.*	Ark. Code Ann. § 4-75-(a)(4)	Up to $1,000 per violation
CA	Cal. Bus. & Prof. Code § 16700 *et seq.* (West)	Cal. Bus. & Prof. Code § 16755	Not more than $1,000,000 or the applicable amount under paragraph (3), whichever is greater. (3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable.
CO	Colorado Antitrust Act of 1992 (Colo. Rev. Stat. § 6-4-101 *et seq.*)	Colo. Rev. Stat. § 6-4-112	Not to exceed $250,000 for each such violation
DC	D.C. Code Ann. § 28-4501 (West)	D.C. Code Ann. § 28-4507 (West)	No civil penalties. Treble damages and costs
CT	Connecticut Antitrust Act (Conn. Gen. Stat. § 35-24 *et seq.*)	Conn. Gen. Stat. § 35-38	Not more than $1,000,000
DE	Delaware Antitrust Act (Del. Code tit. 6, § 2101 *et seq.*)	Del. Code tit. 6, § 2107	Not less than $1,000 nor more than $100,000 for each violation
FL	Florida Antitrust Act of 1980 (Fla. Stat. Ann. §542.15 *et seq.*)	Fla. Stat. Ann. § 542.21	Not more than $1,000,000
GA	No overarching statute		
HI	Hawaii Antitrust Act (Haw. Rev. Stat. § 480-1 *et seq.*)	Haw. Rev. Stat. § 480-3.1	Not less than $500 nor more than $10,000 for each violation. Each day the unfair competition occurs is a separate violation.

STATE	STATUTE VIOLATED	PENALTY PROVISION	STATUTORY PENALTY AMOUNT
ID	Idaho Competition Act (Idaho Code § 48-101 *et seq.*)	Idaho Code § 48-108(1)(d)	Up to $50,000 per violation
IL	Illinois Antitrust Act (740 Ill. Comp. Stat. 10/1 *et seq.*)	740 Ill. Comp. Stat. 10/7(4)	Not to exceed $1,000,000
IN	Ind. Code Ann. § 24-1-2-1 *et seq.* (West)	Ind. Code Ann. § 24-1-2-7 (West)	No civil penalties. Treble damages and costs
IA	Iowa Competition Law (Iowa Code § 553.1 *et seq.*)	Iowa Code § 553.13	Shall not exceed 10% of the total value of the specific commodities by their brand, make, and size or of services either of which were the subject of the prohibited conduct sold in the relevant market in this state by the enterprise in each year in which this conduct occurred, but this penalty shall not exceed $150,000. In computing this penalty, only the four most recent years in which the prohibited conduct occurred, as of commencement of suit under this section, shall be used in the computation
KS	Kansas Restraint of Trade Act (Kan. Stat. Ann. § 50-101 *et seq.*)	Kan. Stat. Ann. § 50-160	A sum of not less than $100 nor more than $5,000 for each day such violation shall have occurred
KY	Kentucky Consumer Prot. Act (Ky. Rev. Stat. Ann. § 367.110 *et seq.*)	Ky. Rev Stat. Ann. § 367.990(8)	Not more than the greater of $5,000 or $200 per day for each violation
LA	La. Stat. Ann. § 51:121 *et seq.*	La. Stat. Ann. §§ 51:122 and 123	No civil penalties. Fine not more than $5,000, or imprisonment
ME	Maine Monopolies and Profiteering Act (Me. Rev. Stat. tit. 10, § 1101 *et seq.*)	Me. Rev. Stat. tit. 10, § 1104(3)	Not more than $100,000 for each course of conduct that constitutes a violation
MD	Maryland Antitrust Act (Md. Code Ann., Com. Law § 11-201 *et seq.*)	Md. Code, Com. Law § 11-209(a)(4) as amended by 2018 Maryland Laws Ch. 847 (H.B. 1544)	Not exceeding $10,000 for each violation. Each day that a violation continues is a separate violation
MA	Mass. Gen. Laws Ann. ch. 93, §§ 4 to 6 (West)	Mass. Gen. Laws Ann. ch. 93, § 9 (West)	Not more than $25,000 for any course of conduct, pattern of activity or activities
MI	Michigan Antitrust Reform Act (Mich. Comp. Laws § 445.771 et seq.)	Mich. Comp. Laws § 445.777	Not more than $50,000 for each violation

STATE	STATUTE VIOLATED	PENALTY PROVISION	STATUTORY PENALTY AMOUNT
MN	Minnesota Antitrust Law of 1971 (Minn. Stat. § 325D.49 *et seq.*)	Minn. Stat. § 325D.56(1)	Not more than $50,000 per violation
MS	Miss. Code Ann. § 75-21-1 *et seq.*	Miss. Code Ann. §§ 75-21-1, -7, and -9	[Sec. 75-1] For a first offense, not less than $100 nor more than $5,000. For a second or subsequent offense, not less than $200 nor more than $10,000. [Sec. 75-7] Not less than $100 nor more than $2,000.00 for every such violation. Each month in which the conduct persists shall be a separate violation. [Sec. 75-9] (Private party suit) $500 for each instance of injury.
MO	Missouri Antitrust Law (Mo. Ann. Stat. § 416.011 *et seq.*)	Mo. Ann. Stat. § 416.051 (West)	No civil penalties. Find of up to $50,000, or imprisonment
MT	Mont. Code Ann. § 30-14-201 *et seq.* (West)	Mont. Code Ann. § 30-14-224(2) (West)	No civil penalties. Fine in an amount not exceeding $25,000, or imprisonment
NE	Nebraska Consumer Protection Act (Neb. Rev. Stat. § 59-1601 *et seq.*)	Neb. Rev. Stat. § 59-1614	Not more than $500,000
NV	Nevada Unfair Trade Practice Act (Nev. Rev. Stat. Ann. § 598A.010 *et seq.*)	Nev. Rev. Stat. Ann. § 598A.170 (West)	An amount not to exceed 5 percent of the gross income realized by the sale of commodities or services sold by such persons in this state in each year in which the prohibited activities occurred.
NH	New Hampshire Antitrust Provisions (N.H. Rev. Stat. Ann. § 356:1 *et seq.*)	N.H. Rev. Stat. Ann. § 356:4-a and -b	Not more than $25,000 for each violation of any provision of this chapter
NJ	New Jersey Antitrust Act (N.J. Stat. Ann. § 56:9-1 *et seq.*)	N.J. Stat. Ann. § 56:9-10(c) (West)	Not more than the greater of $100,000.00 or $500.00 per day for each and every day of said violation
NM	Antitrust Act (N.M. Stat. § 57-1-1 *et seq.*)	N.M. Stat. § 57-1-7(A)	Not to exceed $250,000
NY	NY Gen. Bus. Law § 340 *et seq.*	N.Y. Gen. Bus. Law §§ 341 and 342-a	Not exceeding $1,000,000 for a corporation
NC	N.C. Gen. Stat. § 75-1 *et seq.*)	N.C. Gen. Stat. § 75-15.2	Up to $5,000 for each violation if the defendant's acts were, when committed, knowingly violative
ND	Uniform State Antitrust Act (N.D. Cent. Code Ann. § 51-08.1-01 *et seq.*)	N.D. Cent. Code Ann. § 51-08.1-07 (West)	Not more than fifty thousand dollars for each violation
OH	Ohio Rev. Code § 1331.01 *et seq.*	Ohio Rev. Code §1331.03	$500 for each day that such violation is committed or continued after due notice is given by the attorney general

STATE	STATUTE VIOLATED	PENALTY PROVISION	STATUTORY PENALTY AMOUNT
OK	Oklahoma Antitrust Reform Act (Okla. Stat. Ann. tit. 79, § 201 *et seq.*)	Okla. Stat. Ann. tit. 79, § 205 (West)	No civil penalties. Treble damages and costs.
OR	Antitrust Law (Or. Rev. Stat. § 646.705 *et seq.*)	Or. Rev. Stat. § 646.760	Not more than $250,000 for each violation
PA	No overarching statute.		
RI	Rhode Island Antitrust Act (R.I. Gen. Laws § 6-36-1 *et seq.*)	R.I. Gen. Laws § 6-36-10(c)	Not more than $50,000 for each violation
SC	S.C. Code Ann. § 39-3-10 *et seq.*	S.C. Code Ann. § 39-3-180	Not less than $200, nor more than $5,000, for every such offense. Each day such person shall continue to do so shall be a separate offense
SD	S.D. Codified Laws § 37-1-3.1 *et seq.*	S.D. Codified Laws § 37-1-14.2	Not more than $50,000 for each violation
TN	Tenn. Code Ann. § 47-25-101 *et seq.*	Tenn. Code Ann. § 47-25-103 (West)	No civil penalties. Criminal fine not exceeding $1,000,000
TX	Texas Free Enterprise and Antitrust Act of 1983 (Tex. Bus. & Com. Code Ann. § 15.01 *et seq.*	Tex. Bus. & Com. Code Ann. § 15.20 (West)	Not to exceed $1,000,000 if a corporation
UT	Utah Antitrust Act (Utah Code § 76-10-3101 *et seq.*)	Utah Code § 76-10-3108	Not more than $500,000 for each violation
VT	Vt. Stat. Ann. tit. 9, § 2451 *et seq.*	Vt. Stat. Ann. tit. 9, § 2458(b)(1)	Not more than $1,000,000.00 for each unfair method of competition
VA	Virginia Antitrust Act (Va. Code § 59.1-9.1 *et seq.*)	Va. Code § 59.1-9.11	Not more than $100,000 for each willful or flagrant violation
WA	Consumer Protection Act (Wash. Rev. Code § 19.86.010 *et seq.*)	Wash. Rev. Code § 19.86.140	Not more than $500,000
WV	West Virginia Antitrust Act (W. Va. Code § 47-18-1 *et seq.*)	W. Va. Code § 47-18-8	Not more than the greater of a total of $100,000 or $500 per day for each and every day of said violation
WI	Wis. Stat. § 133.01 *et seq.*	Wis. Stat. § 133.03(3)	A corporation may be required to forfeit not more than $100,000
WY	Wyo. Stat. Ann. § 40-4-101 *et seq.*	Wyo. Stat. Ann. § 40-4-104 (West)	No civil penalties. Fine not more than $5,000.00